



**6714-01-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 380**

**RIN: 3064-AD73**

**DEFINITION OF ‘PREDOMINANTLY ENGAGED IN ACTIVITIES THAT ARE FINANCIAL IN NATURE OR INCIDENTAL THERETO’**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Supplemental notice of proposed rulemaking and request for comment.

**SUMMARY:** The Federal Deposit Insurance Corporation (“FDIC”) is amending the definition of “financial activities” set forth in section 380.8 of the FDIC’s notice of proposed rulemaking published in the Federal Register on March 23, 2011 titled “Orderly Liquidation Authority” (“March 2011 NPR”).<sup>1</sup> The March 2011 NPR proposed standards for determining if a company is predominantly engaged in financial activities for purposes of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”).<sup>2</sup> A company that is predominantly engaged in such

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<sup>1</sup> 76 FR 16324 (March 23, 2011).

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

activities is a “financial company” for purposes of Title II of the Act (unless it is one of the few entities specifically excepted). Provisions of the March 2011 NPR other than section 380.8 already have been finalized. Based on a number of factors described within this notice of proposed rulemaking (“NPR”), the FDIC believes that it is necessary to clarify the scope of the activities that would be considered to be financial activities. Accordingly, this NPR amends section 380.8 of the March 2011 NPR to clarify the activities that would be considered to be financial activities for purposes of determining if a company is predominantly engaged in such activities under Title II of the Act.

**DATES:** Comments should be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Agency Web site:** <http://www.FDIC.gov/regulations/laws/federal/propose.html>
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, **Federal Deposit Insurance Corporation**, 550 17th Street, NW, Washington, DC 20429.
- **Hand Delivered/Courier:** The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.
- **E-mail:** [comments@FDIC.gov](mailto:comments@FDIC.gov).

Instructions: Comments submitted must include “FDIC” and “RIN 3064-AD73

.” Comments received will be posted without change to <http://www.FDIC.gov/regulations/laws/federal/propose.html>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

Ryan K. Clougherty, Senior Attorney, (202) 898-3843; or Robert C. Fick , Supervisory Counsel, (202) 898-8962, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

**I. Background.**

Title II of the Dodd-Frank Act (“Title II”) provides for the appointment of the FDIC as receiver of a covered financial company following the prescribed recommendation, determination, and, if applicable, judicial review process set forth in the Act. Title II outlines the process for the orderly liquidation of such a covered financial company following the FDIC’s appointment as receiver. The March 2011 NPR was intended to provide clarity and certainty with respect to how key components of the orderly liquidation authority will be implemented and to ensure that the liquidation process under Title II reflects the Act’s mandate of transparency in the liquidation of covered financial companies. Provisions of the March 2011 NPR other than section 380.8 were adopted in a Final Rule published in the Federal Register on July 15, 2011.<sup>3</sup>

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<sup>3</sup> 76 FR 41626 (July 15, 2011).

Section 201(a)(11) of the Act defines “financial company,” for purposes of Title II, as any company incorporated or organized under any provision of Federal law or the laws of any State that is: (a) a bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (“BHC Act”)<sup>4</sup>; (b) a nonbank financial company supervised by the Board of Governors of the Federal Reserve System (“Board of Governors”); (c) any company that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the BHC Act;<sup>5</sup> or (d) any subsidiary of any of the aforementioned companies that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the BHC Act, other than a subsidiary that is an insured depository institution or insurance company.<sup>6</sup>

Section 201(b) of the Act provides that, for the purposes of defining the term “financial company” under section 201(a)(11), “[n]o company shall be deemed to be predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the [BHC Act], if the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company, as the Corporation, in consultation with the Secretary [of the Treasury], shall establish by regulation. In

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<sup>4</sup> 12 U.S.C. § 1841(a).

<sup>5</sup> 12 U.S.C. § 1843(k).

<sup>6</sup> Section 201(a)(11) also provides that “financial company” does not include Farm Credit System institutions chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. § 2001 *et seq.*), or governmental or regulated entities as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. § 4502(20)).

determining whether a company is a financial company under [Title II], the consolidated revenues derived from the ownership or control of a depository institution shall be included.” A company that is predominantly engaged in such activities is a “financial company” under Title II (unless it is one of the few entities specifically excepted).

Section 380.8 as proposed in the March 2011 NPR (“section 380.8”) set forth the criteria for determining if a company is predominantly engaged in financial activities for the purposes of Title II. Specifically, proposed section 380.8 provided that a company is predominantly engaged in financial activities if: (a) at least 85 percent of the total consolidated revenues of the company for *either* of its two most recent fiscal years were derived, directly or indirectly, from financial activities, or (b) based upon all the relevant facts and circumstances, the FDIC determines that the consolidated revenues of the company from financial activities constitute 85 percent or more of the total consolidated revenues of the company. The public comment period on the March 2011 NPR closed on May 23, 2011.

Just prior to the FDIC’s publication of the March 2011 NPR, the Board of Governors published a notice of proposed rulemaking titled “Definitions of ‘Predominantly Engaged in Financial Activities’ and ‘Significant’ Nonbank Financial Company and Bank Holding Company” (“Board of Governors’ NPR”).<sup>7</sup> The Board of Governors’ NPR proposed criteria for determining whether a company is “predominantly engaged in financial activities” for purposes of determining if the company is a nonbank financial company under Title I of the Act.<sup>8</sup>

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<sup>7</sup> 76 FR 7731 (February 11, 2011).

<sup>8</sup> Under section 113 of the Act, the Financial Stability Oversight Council (“FSOC”) may designate a nonbank financial company for supervision by the Board of Governors if the FSOC determines that

The Title I definition of “predominantly engaged in financial activities” is based upon activities that are “financial in nature” as defined in section 4(k) of the BHC Act. Similarly, the criteria for determining under Title II whether a company (other than a bank holding company or a nonbank financial company supervised by the Board of Governors) is predominantly engaged in financial activities is primarily based upon activities that the Board of Governors has determined are “financial in nature” under section 4(k) of the BHC Act. As a result of these commonalities, the FDIC coordinated closely with the Board of Governors on the proposed criteria set forth in section 380.8 in the March 2011 NPR.<sup>9</sup>

Thereafter, the Board of Governors published a supplemental notice of proposed rulemaking that would amend the definition of financial activities set forth in the Board of Governors’ NPR (“Board of Governors’ Amended NPR”).<sup>10</sup> The Board of Governors’ Amended NPR was published in response to a number of comments the Board of Governors received that raised questions as to whether the conduct of certain financial activities in a manner that did not comply with the conditions applicable to the conduct of such activities by bank holding companies should be considered to be financial activities under Title I of the Dodd-Frank Act.

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material financial distress of the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the company’s activities, could pose a threat to the financial stability of the United States.

<sup>9</sup> On July 15, 2011, the FDIC issued a final rule that implemented the provisions of the March 2011 NPR except section 380.8. Due to the ongoing coordination efforts between the FDIC and the Board of Governors, the final rule reserved section 380.8. *See* 76 FR 41626 (July 15, 2011).

<sup>10</sup> 77 FR 21494 (April 10, 2012).

As discussed in the Board of Governors' Amended NPR, section 4(k) of the BHC Act ("section 4(k)") and the Board of Governors' Regulation Y ("Regulation Y")<sup>11</sup> contain a broad list of financial activities and impose conditions on bank holding companies conducting those activities. Many of the conditions contained within section 4(k) and Regulation Y are intended to permit bank holding companies to engage in certain financial activities without threatening the safety and soundness of subsidiary depository institutions. Similarly, other conditions are intended to prevent financial holding companies from controlling commercial firms or relate to other provisions of law. Such conditions regulate the conduct of bank holding companies or financial holding companies engaged in such activities, but do not define the essential nature of the activity itself. Defining financial activities for purpose of Title I to include all of those conditions likely would enable some companies to be predominantly engaged in financial activities and yet avoid eligibility for supervision by the Board of Governors simply by choosing not to abide by conditions, including those imposed for safety and soundness purposes. For example, one commenter to both the Board of Governors' NPR and the FDIC's March 2011 NPR suggested that a firm that organizes, sponsors, and manages an open-end investment company (including a mutual fund or money market mutual fund) should not be considered to be engaged in a financial activity if the firm owns or controls more than a given percentage of the fund because a financial holding company may not own or control more than that amount of the fund. As a result the Board of Governors' Amended NPR proposes to clarify that any activity described as financial in nature in section 4(k) would be considered to be a financial activity for purposes of Title I of the

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<sup>11</sup> 12 CFR Part 225.

Act without regard to the conditions and limitations imposed by section 4(k) and Regulation Y on bank holding companies that do not define the activity itself.

Accordingly, the Board of Governors' Amended NPR proposes an appendix, as a supplement to the Board of Governors' NPR, that contains a list of the activities, including conditions that the Board of Governors has determined are necessary to define the activity as financial. The financial activities defined in the Board of Governors' Amended NPR appendix are substantively identical to those in section 4(k), but do not include the conditions and limitations imposed on the conduct of the activity by a bank holding company for reasons such as safety and soundness. The FDIC consulted with the Board of Governors during the development of this NPR. The FDIC also consulted with the U.S. Department of Treasury, as required by section 201(b) of the Act.

## **II. Overview of Comments**

The FDIC received 6 comments relating to section 380.8 in response to the March 2011 NPR. One comment, discussed above, addressed the definition of "financial activities" for purposes of Title II. The FDIC intends to provide a complete discussion of the comments submitted regarding section 380.8 after considering the comments received on this NPR. The FDIC invites comments on all aspects of the proposed amendment contained within this NPR.

## **III. Proposed Rule.**

As noted above, the Board of Governors' Amended NPR provides a list of the activities that would be considered in determining whether a company is predominantly engaged in financial activities for purposes of Title I. The description of each of the



financial activities does not include any conditions or limitations that are imposed on bank holding companies that do not define the essence of the financial activity.

The FDIC agrees with the exclusion of those conditions and limitations that the Board of Governors has excluded and proposes to adopt the same approach in determining which activities are financial activities for purposes of Title II. The FDIC believes that it is important for several reasons that “financial in nature” for purposes of Title II mean the same as it does for purposes of Title I. First, section 4(k) is in the BHC Act, and the Board of Governors is the Federal agency charged with interpreting and implementing the BHC Act. Any interpretation of “financial in nature” under section 4(k) that is inconsistent with the Board of Governors’ interpretation could frustrate Congressional intent regarding Title II. Section 204 of the Dodd Frank Act generally states that the intent of Title II is to provide for the liquidation of failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard. Based upon this expression of Congressional intent regarding Title II, and given that one of the goals of Title I is to provide the authority to require the supervision of certain nonbank financial companies that could pose a threat to the financial stability of the United States, the FDIC believes that both of these goals can be achieved in a manner consistent with Congressional goals if such a key term as “financial in nature” is given the same meaning in both Titles I and II. Second, utilizing in Title II an interpretation of “financial in nature” that is inconsistent with the Title I interpretation could result in confusion on the part of companies that may be subject to either or both of Titles I and II. For example, if the interpretations are different, a company may rely on the Title I interpretation of “financial

in nature” to incorrectly conclude that it is not subject to Title II’s orderly liquidation authority. Conversely, a company may use the Title II interpretation of “financial in nature” to incorrectly conclude that it is not eligible under the Financial Stability Oversight Council’s Title I authority to be supervised by the Board of Governors and subject to enhanced prudential standards. Third, as noted above, the FDIC believes that it is important that Titles I and II work together in a manner that provides a coherent framework for monitoring and controlling financial companies that could have a serious adverse effect on the financial stability of the United States, as they operate, and for liquidating those companies, should it be necessary, with the least disruption to the U.S. financial stability, if any should fail.

While both Title I and Title II rely on section 4(k) to determine whether a company is predominantly engaged in financial activities, there are two important differences between the two titles in how section 4(k) is utilized. One of those differences<sup>12</sup> is that, for purposes of Title I, only those activities that are “financial in nature” as defined in section 4(k) are included in determining whether a company is predominantly engaged in financial activities.<sup>13</sup> In contrast, Title II contemplates the inclusion of activities that the Board of Governors has determined are either “financial in

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<sup>12</sup> Under section 102(a)(6) of the Act, a company is predominantly engaged in financial activities for purposes of Title I if (i) the company’s annual gross revenues derived from such activities constitute 85 percent or more of the company’s annual gross consolidated revenues, or (ii) the company’s consolidated assets related to such activities represent 85 percent or more of the consolidated assets of the company. Conversely, under Title II, a company is predominantly engaged in financial activities only if the company’s consolidated revenues derived from financial activities constitute 85 percent or more of the company’s total consolidated revenues.

<sup>13</sup> Section 102(a)(6) of the Dodd Frank Act.

nature” or “incidental thereto” under section 4(k).<sup>14</sup> Consequently, the FDIC is proposing to amend the March 2011 NPR to clarify that, consistent with the Board of Governors’ Amended NPR and the purposes of Title II, the term “financial activity” includes each activity referenced in section 4(k) that the Board of Governors has determined are either financial in nature or incidental thereto without regard to conditions or limitations that are imposed on bank holding companies engaged in such activities that do not define the essential nature of the activity itself.<sup>15</sup>

The FDIC consulted with the Board of Governors during the development of this NPR. The FDIC also consulted with the U.S. Department of Treasury, as required by section 201(b) of the Act.

*Definition of Financial Activity.*

Section 380.8 of the March 2011 NPR proposed a definition of “financial activity” that includes: (a) any activity, wherever conducted, described in 12 CFR 225.86 or any successor regulation; (b) ownership or control of one or more depository institutions; and (c) any other activity, wherever conducted, determined by the Board of Governors in consultation with the Secretary of the Treasury, under section 4(k)(1)(A) of the BHC Act<sup>16</sup> to be financial in nature or incidental to a financial activity.<sup>17</sup>

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<sup>14</sup> The only effect of this difference is that this NPR includes finder activities as “financial activities” in addition to the activities that are listed as financial-in-nature.

<sup>15</sup> As noted in the Board of Governors’ Amended NPR, conditions that do not define the activity itself include those conditions that were imposed to ensure that the activity is conducted in a safe and sound manner, to prevent a financial holding company from controlling a commercial firm, or to comply with another provision of law. *See* 77 FR 21494 (April 10, 2012).

<sup>16</sup> *See*, 12 U.S.C. § 1843(k)(1)(A).

<sup>17</sup> *See*, 76 FR 16324 (March 23, 2011).

As amended by this NPR, the activities that would be considered financial activities are those described in section 4(k) that the Board of Governors has determined are financial in nature or incidental thereto, but without the conditions and limitations imposed for safety and soundness reasons or to ensure compliance with other applicable law on the conduct of those activities by a bank holding company. Similar to the conclusion cited in the Board of Governors' Amended NPR, the FDIC believes that defining financial activities for purpose of Title II to include all of those conditions likely would enable some companies to be predominantly engaged in financial activities and yet avoid the orderly liquidation process simply by choosing not to abide by the conditions imposed on bank holding companies, including those imposed for safety and soundness. The FDIC believes that excluding those conditions that regulate the conduct of an activity by a bank holding company is consistent with the purposes of both Title II and Title I.

Additionally, because section 4(k) references financial activities that were authorized by the Board of Governors under various authorities at different points in time, certain of these financial activities overlap with, or are wholly subsumed by, other financial activities that are permissible for financial holding companies.<sup>18</sup> The FDIC has attempted to identify and request comment on these potential areas of overlap throughout this NPR. The following discussion describes the categories of the activities that are financial activities for purposes of this NPR and identifies the conditions of section 4(k)

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<sup>18</sup> For example, activities permitted as “closely related to banking” and “usual in connection with banking abroad” were authorized by the Board of Governors over many years of interpreting the BHC Act and the International Banking Act, respectively. Because the Gramm-Leach-Bliley Act incorporated all such activities by reference in section 4(k) and authorized additional financial activities, overlapping financial activities are authorized separately in section 4(k), and in some cases, subject to different limitations and conditions.

and Regulation Y that are not reflected in the NPR due to the fact that they do not define the essential nature of the activity.

- ***Lending, exchanging, transferring, investing for others, or safeguarding money and securities***

The activities of lending, exchanging, transferring, investing for others, or safeguarding money and securities were authorized as permissible for financial holding companies by the Gramm-Leach-Bliley Act (“GLB Act”).<sup>19</sup>

- ***Insurance activities***

A broad range of insurance activities, including insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State, were authorized as permissible for financial holding companies by the GLB Act.<sup>20</sup>

- ***Financial, investment, and economic advisory services***

The activities of providing investment, financial, or economic advisory services were authorized as permissible for financial holding companies by the GLB Act.<sup>21</sup>

- ***Securitizing***

The activity of issuing or selling instruments representing interests in pools of assets was authorized as permissible for financial holding companies by the GLB Act.<sup>22</sup>

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<sup>19</sup> 12 U.S.C. § 1843(k)(4)(A).

<sup>20</sup> 12 U.S.C. § 1843(k)(4)(B).

<sup>21</sup> 12 U.S.C. § 1843(k)(4)(C).

<sup>22</sup> 12 U.S.C. § 1843(k)(4)(D).

The GLB Act also imposed the condition that the assets being securitized must be permissible for a bank to hold directly. This condition appears to address both safety and soundness matters and restrictions imposed by other provisions of law unrelated to the financial nature of the activity, and consequently, is excluded from the definition of this activity.

- ***Underwriting, dealing, and market making***

The activities of underwriting, dealing in, and making a market in securities were authorized as permissible for financial holding companies by the GLB Act.<sup>23</sup>

- ***Extending credit and servicing loans***

The activities of making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others were authorized by the Board of Governors as activities that are closely related to banking and thus permissible for bank holding companies.<sup>24</sup> The FDIC requests comment on whether these lending activities are included in the broad authorization of lending under section 4(k)(4)(A) of the BHC Act and need not be separately reflected in this NPR.

- ***Activities related to extending credit***

Activities usual in connection with making, acquiring, brokering, or servicing loans or other extensions of credit were determined to be permissible by the Board of Governors for bank holding companies as activities that are closely related to banking.<sup>25</sup>

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<sup>23</sup> 12 U.S.C. § 1843(k)(4)(E).

<sup>24</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(1).

<sup>25</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(2).

These activities include performing appraisals of real estate and personal property (including securities), acting as an intermediary for commercial or industrial real estate financing, providing check guarantee services, providing collection agency services, providing credit bureau services, engaging in asset management, servicing, and collection activities, acquiring debt in default, and providing real estate settlement services.<sup>26</sup> This NPR reflects these activities without the conditions imposed on the conduct of these activities by a bank holding company that do not describe the financial activities themselves.

For example, under the Board of Governors' Regulation Y, a bank holding company may not have an interest in, participate in managing or developing, or promote or sponsor the development of the property for which it is arranging commercial real estate equity financing. This NPR does not reflect these conditions because they are not essential to the activity of arranging commercial real estate equity financing.<sup>27</sup> Similarly, under the regulations issued by the Board of Governors, bank holding companies conducting asset management activities may engage in these activities only if the company does not also engage in real property management or real estate brokerage.<sup>28</sup> This NPR does not reflect that condition because, for purposes of determining whether a company is predominantly engaged in financial activities, the restriction could be read to exclude any asset management activity from being treated as financial if the company also engaged in any real estate brokerage or property management activities. Neither real

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<sup>26</sup> Id.

<sup>27</sup> Neither real estate brokerage nor real estate management is an activity that is financial in nature. See 12 U.S.C. § 1843 note; Pub. Law 111-8, sec. 624 (March 11, 2009).

<sup>28</sup> See, 12 CFR 225.28(b)(2)(vi).

estate brokerage nor real estate management is a permissible financial activity for financial holding companies, and neither activity is considered to be financial for purposes of Title II. As a result, a company may engage in these activities and still be predominantly engaged in financial activities so long as the revenues from its financial activities comprise at least 85 percent of the company's total consolidated revenues.

The Board of Governors' regulations require a bank holding company acquiring debt in default to divest impermissible assets securing debt in default within a certain time period, stand only in the position of a creditor, not purchase equity of obligors of debt in default, and not acquire debt in default secured by shares of a bank or bank holding company. This NPR does not reflect these conditions because they do not appear to be part of the essential nature of the activity of acquiring debt in default. The conditions requiring the bank holding company to divest impermissible assets, stand only in the position of a creditor, and not purchase equity of obligors are intended to prevent a bank holding company from owning assets prohibited by the BHC Act or other provisions of law and do not define the essential nature of the activity of acquiring debt in default. Similarly, the condition requiring that the debt not be secured by shares of a bank or bank holding company was imposed to prevent the bank holding company from circumventing the BHC Act's requirement that a bank holding company obtain approval from the Board of Governors before acquiring control of another bank or bank holding company.

- *Leasing*



Leasing personal or real property, and acting as an agent, broker, or adviser for personal or real property was determined to be closely related to banking by the Board of Governors.<sup>29</sup>

- ***Operating nonbank depository institutions***

The activities of owning, controlling, and operating depository institutions that are not “banks” under the BHC Act, including industrial banks, Morris Plan banks, industrial loan companies and savings associations, were determined to be closely related to banking by the Board of Governors.<sup>30</sup> While regulations issued by the Board of Governors require that a target savings association be engaged only in deposit-taking activities and activities permissible for bank holding companies, this NPR does not include these conditions because they are not essential elements of the activity of owning a nonbank depository institution.

- ***Trust company functions***

The activities performed by a trust company were determined to be closely related to banking by the Board of Governors.<sup>31</sup> The FDIC requests comment on whether trust company functions are incorporated in the broad authorization provided under section 4(k)(4)(A) to engage in lending, exchanging, transferring, investing for others, and safeguarding financial assets and need not be separately reflected in the NPR.

- ***Financial and investment advisory activities***

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<sup>29</sup> 12 U.S.C. § 1834(k)(4)(F); 12 CFR 225.28(b)(3).

<sup>30</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(4).

<sup>31</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(5).

The activities of acting as an investment or financial advisor to any person were determined to be closely related to banking by the Board of Governors.<sup>32</sup> These activities have been defined to include, without limitation, serving as a registered investment advisor to a registered investment company, including sponsoring, organizing, and managing a closed-end investment company; furnishing general economic information and advice, general economic statistical forecasting services, and industry studies; providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions; conducting financial feasibility studies; providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments; providing educational courses and instructional materials to consumers on individual financial management matters; and providing tax-planning and tax-preparation services to any person.<sup>33</sup> The FDIC requests comment on whether these financial and investment advisory activities are incorporated in the broad authorization provided by section 4(k)(4)(C) of the BHC Act to provide financial, investment, and economic advisory services and need not be separately reflected in this NPR.

- ***Agency transactional services***

Agency transactional services, including providing securities brokerage services, acting as a riskless principal, providing private placement services, and acting as a futures

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<sup>32</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(6).

<sup>33</sup> Id.

commission merchant, were determined to be closely related to banking by the Board of Governors.<sup>34</sup> Conditions that were imposed on bank holding companies conducting these activities in order to prevent circumvention of the Glass-Steagall Act or for safety and soundness reasons are not reflected in this NPR.

These conditions include, for instance, that bank holding companies providing securities brokerage services under this authority are limited to buying and selling securities solely as agent for the account of customers and not conducting securities underwriting or dealing activities; those providing private placement services under this authority cannot purchase or repurchase for their own account the securities being placed or hold in inventory unsold portions of issues of those securities; and those acting as riskless principal under this authority are subject to conditions with respect to bank-ineligible securities. These conditions were intended to prevent a bank holding company from using securities brokerage or riskless principal authority to engage in activities that were impermissible under the Glass-Steagall Act.<sup>35</sup>

In order to act as a futures commission merchant, a bank holding company must conduct the activity through a separately incorporated subsidiary, the contract must be traded on an exchange, and the parent bank holding company cannot guarantee that subsidiary's liabilities. The NPR does not reflect these conditions, as they were imposed for safety and soundness reasons to limit the bank holding company's exposure to contingent obligations under the loss sharing rules of exchange clearinghouses in order to

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<sup>34</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(7).

<sup>35</sup> 62 FR 9308 (February 8, 1997).

preserve the holding company's ability to serve as a source of strength to its insured depository institutions.<sup>36</sup>

In order to provide agent transactional services to customers on certain commodity derivatives transactions, the derivative must relate to a commodity that is traded on an exchange (regardless of whether the contract being traded is traded on an exchange). The NPR does not reflect this limitation because it appears to have been imposed for safety and soundness reasons and does not describe the underlying activity of providing transactional services on derivatives transactions. The FDIC requests comment on whether the agency transactional services discussed above are included in the broad authorization provided under section 4(k)(5) to engage in arranging, effecting, or facilitating financial transactions for the account of third parties and need not be separately reflected in this NPR.

- ***Investment transactions as principal***

Engaging in investment transactions as principal, including underwriting and dealing in government obligations and money market instruments and investing and trading as principal in foreign exchange and derivatives, and buying and selling bullion, are activities that were determined to be closely related to banking by the Board of Governors.<sup>37</sup> Under regulations issued by the Board of Governors, bank holding companies engaged in underwriting and dealing in government obligations and money market instruments are subject to the same conditions imposed on member banks engaged in these activities. The NPR does not reflect these conditions because they were

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<sup>36</sup> *Id.* at 9309.

<sup>37</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(8).

intended to prevent circumvention of the Glass-Steagall Act. In addition, under the Board of Governors' applicable regulations, bank holding companies engaged in derivatives transactions are subject to certain conditions, including that the derivative contract itself cannot be a bank-ineligible security and either the asset underlying the contract be a bank permissible asset or that the contract contain protections against physical settlement. This NPR does not include these conditions imposed on derivatives activities because these conditions appear to have been imposed to prevent circumvention of the Glass-Steagall Act's limitations on underwriting and dealing activities and for safety and soundness reasons.

The FDIC requests comment on whether the activity of underwriting and dealing in government obligations and money market instruments is included in the broad authorization provided under section 4(k)(4)(E) of the BHC Act to engage in underwriting, dealing in, or making a market in securities and need not be separately reflected in this NPR for purposes of Title II.

- ***Management consulting and counseling activities***

Providing management consulting services on any matter to unaffiliated depository institutions and on any financial, economic, accounting, or audit matter to any other company was determined to be closely related to banking by the Board of Governors.<sup>38</sup> Under regulations issued by the Board of Governors, bank holding companies engaged in management consulting activities may not own more than five (5) percent of the client institution or have a management interlock. This NPR does not reflect this condition because it was intended to ensure that a bank holding company does

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<sup>38</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(i).

not exercise control over a client company through a management consulting contract and to prevent conflicts of interest.<sup>39</sup> The FDIC requests comment on whether the activity of management consulting is subsumed by the broader authority to engage in management consulting services that was determined to be usual in connection with banking abroad and need not be separately reflected in this NPR for purposes of Title II.

Providing employee benefits consulting services was determined to be closely related to banking by the Board of Governors<sup>40</sup> and is included in this NPR. Providing career counseling services also was determined to be closely related to banking by the Board of Governors, subject to the conditions that the services are provided to a financial organization, to individuals who are seeking employment at a financial institution, or to individuals currently employed in or who are seeking positions in the finance, accounting, and audit departments of any company.<sup>41</sup> These conditions appear to be essential to this activity's being considered financial and thus are included in the definition of this financial activity for purposes of Title II in this NPR.

- ***Courier services and printing and selling MICR-encoded items***

Providing courier services for certain instruments and audit and accounting media, and printing and selling MICR-encoded items were determined to be closely related to banking by the Board of Governors.<sup>42</sup>

- ***Insurance agency and underwriting***

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<sup>39</sup> See 62 FR 9312 (February 28, 1997).

<sup>40</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(ii).

<sup>41</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(iii).

<sup>42</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(10)(i); 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(10)(ii).

Activities related to the provision of credit insurance and insurance in small towns were determined by the Board of Governors to be closely related to banking.<sup>43</sup> The FDIC requests comment on whether these insurance activities are included in the broad authorization of insurance activities provided under section 4(k)(4)(B) of the BHC Act and thus need not be separately reflected in this NPR for purposes of Title II.

- ***Community development activities***

Making debt and equity investments in corporations or projects that are designed primarily to promote community welfare, and providing advisory and related services for such programs, was determined to be closely related to banking by the Board of Governors.<sup>44</sup>

- ***Money orders, savings bonds, and traveler's checks***

The issuance and sale of money orders and traveler's checks, and the issuance of savings bonds, were determined to be closely related to banking by the Board of Governors.<sup>45</sup>

- ***Data processing***

Providing data processing services and related activities with respect to financial, banking, or economic data was determined to be closely related to banking by the Board of Governors.<sup>46</sup> Under regulations issued by the Board of Governors, a bank holding company's data processing activities must comply with the condition that the hardware

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<sup>43</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(11).

<sup>44</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(12).

<sup>45</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(13).

<sup>46</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(14).

provided in connection with these services is offered only in conjunction with software related to the processing, storage, and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than thirty (30) percent of the cost of any packaged offering. This NPR does not include these conditions because they do not define the essential nature of the activity of data processing.

- ***Management consulting services***

Providing management consulting services was determined to be usual in connection with the transaction of banking or other financial operations abroad.<sup>47</sup> Under regulations issued by the Board of Governors, bank holding companies are prohibited from controlling the person to which the services are provided. This NPR does not reflect this condition because it appears to have been intended to ensure that a bank holding company does not exercise control over a client company through a management consulting contract and to prevent conflicts of interest.

- ***Mutual fund advisory services***

Providing administrative and other services to mutual funds was determined to be closely related to banking by the Board of Governors.<sup>48</sup>

- ***Owning shares of a securities exchange***

Owning shares of a securities exchange was determined to be closely related to banking by the Board of Governors.<sup>49</sup>

- ***Certification services***

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<sup>47</sup> 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(1).

<sup>48</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(i).

<sup>49</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(ii)



Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions was determined to be closely related to banking by the Board of Governors.<sup>50</sup>

- ***Providing employment histories***

Providing employment histories to third parties for use in making credit decisions and to depository institutions and their affiliates for use in the ordinary course of business was determined to be closely related to banking by the Board of Governors.<sup>51</sup>

- ***Check-cashing and wire-transmission services***

Providing check-cashing and wire-transmission services was determined to be closely related to banking by the Board of Governors.<sup>52</sup>

- ***Postage, vehicle registration, public transportation services***

Providing notary-public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public-transportation tickets and tokens in connection with offering banking services were determined to be closely related to banking by the Board of Governors.<sup>53</sup>

- ***Real estate title abstracting***

Engaging in real estate title abstracting was determined to be closely related to banking by the Board of Governors.<sup>54</sup>

- ***Travel agency***

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<sup>50</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(iii).

<sup>51</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(iv).

<sup>52</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(v).

<sup>53</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(vi).

<sup>54</sup> 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(vii).

Operating a travel agency in connection with financial services was determined to be usual in connection with the transaction of banking or other financial operations abroad.<sup>55</sup>

- ***Mutual fund activities***

Organizing, sponsoring, and managing a mutual fund was determined to be usual in connection with the transaction of banking or other financial operations abroad.<sup>56</sup>

Under regulations issued by the Board of Governors, bank holding companies are prohibited from exerting managerial control over the companies in which the fund invests and must reduce their ownership to less than twenty-five (25) percent of the equity of the fund within one year of sponsoring the fund. This NPR does not reflect these conditions because they were imposed to prevent circumvention of the investment restrictions in the BHC Act.

- ***Finder activities***

Acting as a finder in bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate has been deemed to be an activity that is financial in nature or incidental thereto by the Board of Governors under section 4(k)(5) of the BHC Act.<sup>57</sup> Under regulations issued by the Board of Governors, acting as a finder includes providing any or all of the following services through any means: (a) identifying potential parties, making inquiries as to interest, introducing and referring potential parties to each other, and arranging contacts

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<sup>55</sup> 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(2).

<sup>56</sup> 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(3).

<sup>57</sup> 12 U.S.C. § 1843(k)(5)(B); 12 CFR 225.86(d)(1).

between and meetings of interested parties; (b) conveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction; and (c) transmitting information concerning products and services to potential parties in connection with the activities listed in (a) and (b).

Under the Board of Governors' Regulation Y, certain limitations are applicable to financial holding companies that engage in finder activities. These limitations include acting only as an intermediary between a buyer and a seller; not binding any buyer or seller to the terms of a specific transaction or negotiating the terms of a specific transaction on behalf of a buyer or seller, except that (1) a finder may arrange for buyers to receive preferred terms from sellers so long as the terms are not negotiated as part of any individual transaction, are provided generally to customers or broad categories of customers, and are made available by the seller (and not by the company), and (2) a finder may establish rules of general applicability governing the use and operation of the finder service, including rules that govern the submission of bids and offers by buyers and sellers, the circumstances under which the finder service will match bids and offers, and the manner in which buyers and sellers may bind themselves to the terms of a specific transaction. These conditions appear to be essential to the essence of the activity, and thus are reflected in this NPR.

Regulation Y also prohibits financial holding companies engaged in finder activities from (a) taking title to or acquiring or holding an ownership interest in any product or service offered or sold through the finder service; (b) providing distribution services for physical products or services offered or sold through the finder service; (c) owning or operating any real or personal property that is used for the purpose of

manufacturing, storing, transporting, or assembling physical products offered or sold by third parties; (d) owning or operating any real or personal property that serves as a physical location for the physical purchase, sale or distribution of products or services offered or sold by third parties; or (e) engaging in any activity that would require the company to register or obtain a license as a real estate agent or broker under applicable law. Each of these conditions, with the exception of the prohibition on engaging in any activity that would require the company to register or obtain a license as a real estate agent or broker, appear to be essential to the nature of acting as a finder and are reflected accordingly in this NPR.

The prohibition on engaging in any activity that would require the company to register or obtain a license as a real estate agent or broker was imposed to prevent bank holding companies from engaging in any real estate brokerage or property management activities. If reflected in this NPR, this prohibition could be read to exclude any finder activity from being considered a financial activity if the company engaged in the activity were also engaged in any real estate brokerage or property management activity. The FDIC believes that this condition does not define the essential nature of the activity of acting as a finder itself. Therefore, because neither real estate brokerage nor real estate management is an activity that is financial in nature, a company may engage in such activities and still be predominantly engaged in financial activities so long as the revenues derived from financial activities comprise at least eighty-five percent of the company's total consolidated revenues.

- ***Merchant banking***

Section 4(k)(4)(H) of the BHC Act authorizes financial holding companies to acquire “shares, assets or ownership interests,” including debt or equity securities, in a company engaged in any activity not authorized under section 4 “as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment,” subject to the following conditions: (a) the shares may not be acquired or held by a depository institution; (b) the shares must be acquired and held by a securities affiliate or an affiliate thereof, or in the case of a financial holding company that has an insurance company affiliate, the shares must be acquired and held by an affiliate that provides investment advice to an insurance company and is registered pursuant to the Investment Advisers Act of 1940, or an affiliate thereof, as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment; (c) the shares must be held for a period of time to enable the sale or disposition on a reasonable basis consistent with the financial viability of the company’s underwriting, merchant, or investment banking activities; and (d) during the period the shares are held, the bank holding company may not routinely manage or operate the company except as may be necessary to obtain a reasonable return on investment upon resale or disposition.<sup>58</sup> The NPR includes the last two of those conditions because they appear to define the essential nature of the activities of underwriting, merchant, or investment banking activities, and omits the first two conditions.

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<sup>58</sup> 12 U.S.C. § 1843(k)(4)(H).

First, the condition requiring that the shares be held for a period of time to enable their sale or disposition on a reasonable basis consistent with the financial viability of the company's underwriting, merchant, or investment banking activities appears to be an essential element of a bona fide underwriting, merchant, or investment banking activity. Thus, this condition is reflected in the NPR. Companies engaging in bona fide underwriting, merchant, or investment banking activities do not invest in investee companies for the purpose of engaging in the activity in which the investee company is engaged, but instead invest with the intent to sell the instruments at some later point in time at which a profit is expected to be realized. The length of time that the shares are held will vary by investment.<sup>59</sup>

For example, certain companies, such as private equity firms, that are engaged in bona fide underwriting, merchant, or investment banking activities typically invest in firms that the private equity firm believes will increase in value over time and can be resold at a profit. The holding period for an investment will vary based on the investee company, and in some cases the private equity firm may hold the shares for several years. A firm such as a hedge fund or a mutual fund invests in firms with the expectation to sell those instruments at a future date in order to realize profits consistent with its particular investment strategy. The holding period for an investment by a hedge fund or a mutual fund will depend on the length of time necessary to recognize gains consistent with the fund's investment strategy.

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<sup>59</sup> The Board of Governors and the Secretary of Treasury jointly promulgated regulations interpreting the holding period for merchant banking investments by financial holding companies under section 4(k)(7) of the BHC Act. This regulatory interpretation is separate from the activity of merchant banking set forth in section 4(k)(4)(H) of the BHC Act and would not apply for determining whether an activity is a financial activity for purposes of Title II. See 12 CFR 225.172 and 12 CFR 1500.3, respectively.

The prohibition on routinely managing an investee company in which it has purchased shares, other than for purposes of recognizing a reasonable return, appears to be an essential element of bona fide underwriting, merchant, or investment banking activities. Thus, this prohibition is reflected in this NPR. As previously discussed, companies engaging in these activities purchase shares of investee companies to recognize an ultimate profit, rather than to engage in the underlying activity in which the investee company engages as its primary business activity. Routinely managing the companies, other than for the goal of recognizing a reasonable return, would be inconsistent with the underlying nature of the activities. Therefore, in order for an activity to qualify as a bona fide underwriting, merchant, or investment banking activity, a financial company must comply with this restriction.<sup>60</sup>

By contrast, the condition requiring that shares acquired as part of a bona fide underwriting or merchant or investment banking activity not be acquired or held by a depository institution is not an essential element of such activities, and thus is not reflected in this NPR. This restriction was imposed because banks are restricted from investing in certain types of companies by statute and regulation.<sup>61</sup> Similarly, the condition in section 4(k) requiring a financial holding company engaging in underwriting or merchant or investment banking activities to either have (a) a securities affiliate, or (b) in the case of a financial holding company that has an insurance company affiliate, an

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<sup>60</sup> The Board of Governors and the Secretary of the Treasury jointly promulgated regulations interpreting the limitation on routine management or operation for merchant banking investments by financial holding companies under section 4(k)(7) of the BHC Act. This regulatory interpretation is separate from the activity of merchant banking set forth in section 4(k)(4)(H) of the BHC Act and would not apply for determining whether an activity is a financial activity for purposes of Title II. See 12 CFR 225.171 and 12 CFR 1500.2, respectively.

<sup>61</sup> See e.g. 12 U.S.C. § 24, (Seventh); 12 U.S.C. § 24 (Eleventh); and 12 CFR Part 1 (for national banks); and 12 U.S.C. § 1831a; and 12 CFR Part 362 (for state banks).

affiliate that provides investment advice to an insurance company and is registered pursuant to the Investment Advisors Act of 1940, does not appear to be an essential element of these activities because the condition does not require that the activity be conducted through the securities affiliate or investment advisor affiliate of the financial holding company. The condition was designed to ensure that only those financial holding companies with experience engaging in underwriting, merchant, or investment banking activities conducted such activities. This NPR proposes to define the activities of underwriting, merchant, and investment banking for purposes of Title II to include only the conditions that appear to be essential elements of the activities themselves, as discussed above.<sup>62</sup>

In addition, this NPR does not reflect the provisions of section 4(k)(4)(H) that the investment be in a company engaged in any activity not authorized under section 4 of the BHC Act because this provision does not affect the scope of activities that are financial activities for purposes of Title II. An investment in a company solely engaged in activities permissible under section 4 of the BHC Act would otherwise be treated as a financial activity.

Section 4(k)(4)(I) of the BHC Act similarly authorizes financial holding companies to acquire “shares, assets or ownership interests,” including debt or equity securities, of a company or other entity engaged in any activity not authorized by section 4(k) if (a) the shares, assets, or ownership interests are not acquired or held by a depository institution or a subsidiary of a depository institution; (b) such shares, assets, or

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<sup>62</sup> Similarly, the FSOC has indicated its belief that nonbank financial companies such as hedge funds, private equity firms, and asset management companies, will be eligible for designation under section 113 of the Act. See 77 FR 21637, 21643 (April 11, 2012); see also 77 FR 21494 (April 10, 2012).



ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident, and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities; (c) such shares, assets, or ownership interest represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and (d) during the period such shares, assets, or ownership interests are held, the bank holding company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

The condition requiring that shares, assets, or ownership interests not be acquired or held by a depository institution does not appear to be an essential element of the investment activities authorized by section 4(k)(4)(I) of the BHC Act, and thus is not reflected in this NPR. This restriction was imposed because banks are restricted from investing in certain types of companies by statute and regulation.<sup>63</sup> Each of the other conditions imposed on the conduct of the activity by a bank holding company appears to be an essential element of the activity of investing in connection with engaging in insurance activities. This NPR proposes to define the investment activities authorized by section 4(k)(4)(I) for purposes of Title II to include only the last three conditions because they appear to be essential elements of these activities, as discussed above.

- ***Lending, safeguarding, exchanging, and investing for others with respect to financial assets other than money and securities***

The GLB Act authorizes the activities of lending, exchanging, transferring, investing for others, safeguarding assets other than money or securities; providing any

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<sup>63</sup> See e.g., 12 U.S.C. § 24, (Seventh); 12 U.S.C. § 24 (Eleventh); and 12 CFR Part 1 (for national banks); and 12 U.S.C. § 1831a; and 12 CFR Part 362 (for state banks).

device or other instrumentality for transferring money or other financial assets; and arranging, effecting, or facilitating financial transactions for the account of third parties for financial holding companies.<sup>64</sup> The GLB Act requires the Board of Governors to define these activities as financial in nature and the extent to which such activities are financial in nature or incidental thereto. The Board of Governors and the Secretary of the Treasury issued a joint interim rule authorizing such activities as permissible for financial holding companies.<sup>65</sup>

- ***Owning or controlling one or more depository institutions***

Section 201(b) of the Dodd-Frank Act requires that revenues derived from the ownership or control of one or more depository institutions be included in determining whether a company is a financial company.

#### **IV. Solicitation of Comments on Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?

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<sup>64</sup> 12 U.S.C. § 1843(k)(5).

<sup>65</sup> See 66 FR 257 (January 3, 2001).

- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

## **V. Administrative Law Matters.**

### *A. Paperwork Reduction Act*

The amendment to the March 2011 NPR contained in this NPR would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 *et seq.*, requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. If so, the agency must prepare an initial and final regulatory flexibility analysis respecting the significant economic impact. Pursuant to section 605(b) of the RFA, the regulatory flexibility analysis otherwise required under sections 603 and 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The FDIC has considered the potential impact of the amendment proposed in this NPR on

small entities in accordance with the RFA. The amendment contained in this NPR does not appear to have a significant economic impact on small entities for several reasons.

First, proposed section 380.8, as amended by this NPR, would establish criteria for calculating revenues to determine whether a company is “predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto” for purposes of determining whether a company is a “financial company” under Title II of the Dodd-Frank Act. In order to be eligible for the orderly liquidation provisions of Title II, a company would have to satisfy the definition of “financial company.” However, a company that is a “financial company” is not automatically subject to the orderly liquidation authority provisions of Title II. Only a financial company for which the Secretary of Treasury has made a determination in accordance with sections 203 of Title II is a “covered financial company” subject to Title II. The amendment contained in this NPR is limited to clarifying the definition of financial activities for purposes of the definition of “financial company” under section 201(a)(11) of the Act.

Second, a determination by the Secretary of the U.S. Treasury under section 203(b) of the Act requires, among other things, a determination that the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States. Under the regulations of the Small Business Administration (SBA), firms within the “Finance and Insurance” sector are considered “small” if their annual receipts do not exceed \$7 million or their total assets do not exceed \$174 million.<sup>66</sup> The FDIC does not expect that Title II

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<sup>66</sup> 13 CFR 121.201.

of the Act will be used to resolve financial companies that qualify as small entities, because the failure of such companies would be unlikely to have serious adverse effects on financial stability in the United States. Therefore, the FDIC does not believe that proposed section 380.8, as amended, would have a significant economic impact on a substantial number of small entities.

For the reasons stated above and pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the proposed rule, as amended by this NPR, will not have a significant economic impact on a substantial number of small entities.

## **Text of the Proposed Rule**

### **FEDERAL DEPOSIT INSURANCE CORPORATION**

#### **12 CFR Chapter III**

#### **List of Subjects**

#### **12 CFR Part 380**

Holding companies, Insurance companies

#### **Authority and Issuance**

For the reasons set forth in the Supplementary Information, the FDIC proposes to amend title 12 part 380 of the Code of Federal Regulations as follows:

#### **PART 380 —ORDERLY LIQUIDATION AUTHORITY**

1. The authority for part 380 continues to read as follows:

**Authority:** 12 U.S.C. 5301 *et seq.*

2. Section 380.8, which was proposed as part of the notice of proposed rulemaking titled “Orderly Liquidation Authority” 76 FR 16324 (March 23, 2011) is amended by revising paragraph (b)(2) to read as follows:

**§ 380.8 Predominantly engaged in activities that are financial or incidental thereto.**

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(b) For purposes of paragraph (a) of this section, the following definitions apply:

(1) \* \* \*

(2) The term “financial activity” means:

(i) Lending, exchanging, transferring, investing for others, or safeguarding money and securities.

(ii) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state.

(iii) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

(iv) Issuing or selling instruments representing interests in pools of assets.

(v) Underwriting, dealing in, or making a market in securities.

(vi) Extending credit and servicing loans. Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(vii) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, including the following activities -

(A) Real estate and personal property appraising. Performing appraisals of real estate and tangible and intangible personal property, including securities.

(B) Arranging commercial real estate equity financing. Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors.

(C) Check-guaranty services. Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(D) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

(E) Credit bureau services. Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(F) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection<sup>1</sup> of assets of a type that an insured depository institution may originate and own.

(G) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition.

(H) Providing real estate settlement services.<sup>2</sup>

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<sup>1</sup> Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

<sup>2</sup> For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.



(viii) Leasing personal or real property. Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if –

(A) The lease is on a nonoperating basis;<sup>3</sup>

(B) The initial term of the lease is at least 90 days; and

(C) In the case of leases involving real property:

(1) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(2) The estimated residual value of property for purposes of paragraph (b)(2)(viii)(C)(1) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

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<sup>3</sup> The requirement that the lease be on a nonoperating basis means that the company may not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease be on a nonoperating basis means that the company may not, directly or indirectly: (1) provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts or accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during the servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor. The company may arrange for a third party to provide these services or products.

(ix) Operating nonbank depository institutions— (A) Industrial banking. Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company that is not a bank for purposes of the BHC Act.

(B) Operating savings association. Owning, controlling, or operating a savings association.

(x) Trust company functions. Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law that is not a bank for purposes of section 2(c) of the Bank Holding Company Act.

(xi) Financial and investment advisory activities. Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(A) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(B) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(C) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions, and conducting financial feasibility studies;<sup>4</sup>

(D) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(E) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(F) Providing tax-planning and tax-preparation services to any person.

(xii) Agency transactional services for customer investments— (A) Securities brokerage. Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services).

(B) Riskless principal transactions. Buying and selling in the secondary market all types of securities on the order of customers as a “riskless principal” to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer.

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<sup>4</sup> Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

(C) Private placement services. Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (1933 Act) and the rules of the Securities and Exchange Commission.

(D) Futures commission merchant. Acting as a futures commission merchant (FCM) for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract.

(E) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(2)(xiii) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not).

(xiii) Investment transactions as principal —(A) Underwriting and dealing in government obligations and money market instruments. Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit,

(B) Investing and trading activities. Engaging as principal in:

(1) Foreign exchange;

(2) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal), nonfinancial asset, or group of assets;

(3) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets.

(C) Buying and selling bullion, and related activities. Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(xiv) Management consulting and counseling activities— (A) Management consulting.  
Providing management consulting advice:<sup>5</sup>

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<sup>5</sup> In performing this activity, companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board of Governors' interpretation of bank management consulting advice (12 CFR 225.131).

(1) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(2) On any financial, economic, accounting, or audit matter to any other company.

(B) Employee benefits consulting services. Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(C) Career counseling services. Providing career counseling services to:

(1) A financial organization<sup>6</sup> and individuals currently employed by, or recently displaced from, a financial organization;

(2) Individuals who are seeking employment at a financial organization; and

(3) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

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<sup>6</sup> Financial organization refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(c)(8)).

(xv) Support services— (A) Courier services. Providing courier services for:

(1) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(2) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.<sup>7</sup>

(B) Printing and selling MICR-encoded items. Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(xvi) Insurance agency and underwriting— (A) Credit insurance. Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(1) Directly related to an extension of credit by the company or any of its subsidiaries; and

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<sup>7</sup> See also the Board's of Governors' interpretation on courier activities (12 CFR 225.129), which sets forth conditions for company entry into the activity.

(2) Limited to ensuring the repayment of the outstanding balance due on the extension of credit<sup>8</sup> in the event of the death, disability, or involuntary unemployment of the debtor.

(B) Finance company subsidiary. Acting as agent or broker for insurance directly related to an extension of credit by a finance company<sup>9</sup> that is a subsidiary of a company, if:

(1) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

(2) The extension of credit is not more than \$10,000, or \$25,000 if it is to finance the purchase of a residential manufactured home<sup>10</sup> and the credit is secured by the home; and

(3) The applicant commits to notify borrowers in writing that:

(i) They are not required to purchase such insurance from the applicant;

(ii) Such insurance does not insure any interest of the borrower in the collateral; and

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<sup>8</sup> Extension of credit includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(2)(viii) of this section.

<sup>9</sup> Finance company includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

<sup>10</sup> These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.



(iii) The applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(C) Insurance in small towns. Engaging in any insurance agency activity in a place where the company or a subsidiary of the company has a lending office and that:

(1) Has a population not exceeding 5,000 (as shown in the preceding decennial census);  
or

(2) Has inadequate insurance agency facilities, as determined by the Board of Governors, after notice and opportunity for hearing.

(D) Insurance-agency activities conducted on May 1, 1982. Engaging in any specific insurance-agency activity<sup>11</sup> if the company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received approval from the Board of Governors to conduct such activity on or before May 1, 1982.<sup>12</sup> A company or subsidiary engaging in a specific insurance agency activity under this clause may:

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<sup>11</sup> Nothing contained in this provision shall preclude a bank holding company subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes and prior notice has been provided to the Board of Governors.

<sup>12</sup> For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board of Governors on May 1, 1982, and approved subsequently by the Board of Governors or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

(1) Engage in such specific insurance agency activity only at locations:

(i) In the state in which the company has its principal place of business (as defined in 12 U.S.C. 1842(d));

(ii) In any state or states immediately adjacent to such state; and

(iii) In any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such company or subsidiary thereof or by any other subsidiary of such company on May 1, 1982; and

(2) Provide other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the company or subsidiary.

(E) Supervision of retail insurance agents. Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:

(1) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the company or its subsidiaries; and

(2) Group insurance that protects the employees of the company or its subsidiaries.

(F) Small companies. Engaging in any insurance-agency activity if the company has total consolidated assets of \$50 million or less. A company performing insurance-agency activities under this paragraph may not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(2)(xvi)(A) and (C) of this section, and it may not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the company and its subsidiaries exceed \$50 million.

(G) Insurance-agency activities conducted before 1971. Engaging in any insurance-agency activity performed at any location in the United States directly or indirectly by a company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board of Governors prior to January 1, 1971.

(xvii) Community development activities —(A) Financing and investment activities. Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(B) Advisory activities. Providing advisory and related services for programs designed primarily to promote community welfare.

(xviii) Money orders, savings bonds, and traveler's checks. The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(xix) Data processing. Providing data processing, data storage and data transmission services, facilities (including data processing, data storage and data transmission hardware, software, documentation, or operating personnel), databases, advice, and access to such services, facilities, or databases by any technological means, if the data to be processed, stored or furnished are financial, banking or economic.

(xx) Providing management consulting services, including to any person with respect to nonfinancial matters, so long as the management consulting services are advisory.

(xxi) Any activity that the Board had determined by an order that was in effect on November 12, 1999, to be so closely related to banking as to be a proper incident thereto. These activities are:

(A) Providing administrative and other services to mutual funds;

(B) Owning shares of a securities exchange;

(C) Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions;

(D) Providing employment histories to third parties for use in making credit decisions and to depository institutions and their affiliates for use in the ordinary course of business;

(E) Check cashing and wire transmission services;

(F) In connection with offering banking services, providing notary public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public transportation tickets and tokens; and

(G) Real estate title abstracting.

(xxii) Operating a travel agency in connection with financial services.

(xxiii) Organizing, sponsoring, and managing a mutual fund.

(xxiv) (A) Acting as a finder in bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate, including providing any or all of the following services through any means-

(1) Identifying potential parties, making inquiries as to interest, introducing, and referring potential parties to each other, and arranging contacts between and meetings of interested parties;

(2) Conveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction; and

(3) Transmitting information conveying products and services to potential parties in connection with the activities described paragraphs (A) and (B) of this section.

(B) The following are examples of the services that may be provided by a finder when done in accordance with paragraphs (b)(2)(xxiv)(A)(1) – (3) of this section. These examples are not exclusive.

(1) Hosting an electronic marketplace on the company's Internet web site by providing hypertext or similar links to the web sites of third party buyers or sellers.

(2) Hosting on the company's servers the Internet web site of—

(i) A buyer (or seller) that provides information concerning the buyer (or seller) and the products or services it seeks to buy (or sell) and allows sellers (or buyers) to submit expressions of interest, bids, offers, orders and confirmations relating to such products or services; or

(ii) A government or government agency that provides information concerning the services or benefits made available by the government or government agency, assists persons in completing applications to receive such services or benefits from the government or agency, and allows persons to transmit their applications for services or benefits to the government or agency.

(3) Operating an Internet web site that allows multiple buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves.

(4) Operating a telephone call center that provides permissible finder services.

(C) To be acting as a finder for purposes of this section, the finder must comply with the following limitations.

(1) A finder may act only as an intermediary between a buyer and a seller.

(2) A finder may not bind any buyer or seller to the terms of a specific transaction or negotiate the terms of a specific transaction on behalf of a buyer or seller, except that a finder may--

(i) Arrange for buyers to receive preferred terms from sellers so long as the terms are not negotiated as part of any individual transaction, are provided generally to customers or broad categories of customers, and are made available by the seller (and not by the financial holding company); and

(ii) Establish rules of general applicability governing the use and operation of the finder service, including rules that govern the submission of bids and offers by buyers and sellers that use the finder service and the circumstances under which the finder service will match bids and offers submitted by buyers and sellers, and govern the manner in which buyers and sellers may bind themselves to the terms of a specific transaction.

(3) A finder may not—

(i) Take title to or acquire or hold an ownership interest in any product or service offered or sold through the finder service;

(ii) Provide distribution services for physical products or services offered or sold through the finder service;

(iii) Own or operate any real or personal property that is used for the purpose of manufacturing, storing, transporting, or assembling physical products offered or sold by third parties; or



(iv) Own or operate any real or personal property that serves as a physical location for the physical purchase, sale or distribution of products or services offered or sold by third parties.

(D) A finder must distinguish the products and services offered by the company from those offered by a third party through the finder service.

(xxv) Directly, or indirectly acquiring or controlling, whether as principal, on behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity if:

(A) Such shares, assets, or ownership interests are acquired and held as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment;

(B) Such shares, assets, or ownership interests are held for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities described in clause (A) of this paragraph; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.

(xxvi) Directly or indirectly acquiring or controlling, whether as principal, on behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity if—

(A) Such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities;

(B) Such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

(xxvii) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.

(xxviii) Providing any device or other instrumentality for transferring money or other financial assets.

(xxix) Arranging, effecting, or facilitating financial transactions for the account of third parties.

(xxx) Ownership or control of one or more depository institutions.

(xxxi) Any other activity, wherever conducted, determined by the Board of Governors of the Federal Reserve System, in consultation with the Secretary of the Treasury, under section 4(k)(1)(A) of the Bank Holding Company Act (12 USC 1843(k)(1)(A)) to be financial in nature or incidental to a financial activity.

By order of the Board of Directors.

Dated at Washington, D.C., this 12<sup>th</sup> day of June, 2012

Federal Deposit Insurance Corporation

Robert E. Feldman  
Executive Secretary

**079982**

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